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CURRENT TOPICS.

In *Wright v. Clark*, 50 Vt 130, the defendant who was sued for killing the plaintiff's dog attempted to justify the killing under a statute of that state (G. L. 627, § 3), which makes it the duty of the owner or keeper of a dog to cause a collar, with his name plainly written thereon, to be worn on the neck of the dog, and then provides: "And it shall be lawful for any person to kill any dog running at large off the premises of the owner or keeper, not having on such collar; and the owner or keeper of such dog shall recover no damage for such killing." It appeared that the dog in question was a hound, kept for hunting, and chained when not in pursuit of game, and that it was shot while engaged in a hunt, though some distance from its master. The court held that the dog was not "running at large," within the meaning of the statute. See Russell v. Cone, 46 Vt. 600.—Another question raised in this case was this: The judge having charged that the jury might give exemplary damages if they found that the defendant shot the dog "intentionally and wantonly," it appeared that after the jury retired, they expressed their opinion that the act of the defendant was unintentional, but somewhat careless; that a discussion then arose as to the proper word to express that idea in their verdict, and as they were unable to agree, the officer in charge, by their direction, brought them a copy of Webster's Unabridged Dictionary, which they consulted in making up their verdict, and from which they took the word "wanton," which they used in the verdict. The court held that there was no error in this. "There is no analogy," said the court, "between the jurors obtaining a dictionary to ascertain the meaning of the language which they use in a special verdict, and giving them the general statutes by direction of the court, to hunt out for themselves the law relating to manslaughter. The jurors are to receive the law from the court. It is the duty and prerogative of the court to explain to the jury the law on any subject brought before them for determination. But the court is under no such duty, uncalled upon, to explain the meaning of ordinary words; neither is it necessarily error for the jury to inform themselves of the meaning of such words from the dictionary, when they have occasion to use them in writing special verdicts."

The case of *Waters v. Stevenson*, recently decided by the Supreme Court of Nevada, contains an exhaustive discussion of the subject of damages in an action of trespass for unlawful conversion. The plaintiff, upon whose lands the defendant had entered, under a mistake as to their extent, and had extracted ore from his mines, was held to be entitled to damages, but these damages were restricted, reversing the ruling of the court below, to the value of the ore as it lay in the mine before it was extracted. In Pierce v. Benjamin, 14 Pick. 361, the court say: "The general rule of damages in actions of trover is, unquestionably, the value of the property taken at the time of its conversion. But there are exceptions and qualifications of this rule as plain and well established as the rule itself. Wherever the property is returned and received by the plaintiff, the rule does not apply. And when the property itself has been sold, and the proceeds applied to the payment of the plaintiff's debt, or otherwise to his use, the reason of the rule ceases and justice forbids its application. In all such cases, the facts may be shown in mitigation of damages." And in Baldwin v. Porter, 12 Conn. 484, it is said: "Both the rule and the exceptions proceeded upon the principle that the plaintiff ought to recover as much, and no more, damages than he has actually sustained, which, commonly, is the value of the property; and hence the general rule. No good reason, consistently, can be suggested why greater damages should ever be recovered than have, in truth, been sustained, except in those cases where the law permits, by way of primitive justice, the recovery of damages." The Supreme Court, in the case at bar, entered into a lengthy review of the cases on the point, viz; Kier v. Peterson, 41 Penn. St. 357; Martin v. Porter, 5 M. & W. 353; Morgan v. Powell, 3 Ad. & El., N. S. 281; Cushing v. Longfellow,

26 Me. 310; Wild v. Holt, 9 M. & W. 671; Bennett v. Thompson, 13 Ired. 148; Smith v. Gondor, 22 Ga. 353; Chicago S. B. Dock Co. v. Dunlap, 32 Ill 210; Forsyth v. Wells. 41 Penn. St. 291; Maye v. Tappan, 23 Cal. 306; Galler v. Fett, 30 Cal. 485; Barton Coal Co. v. Fox, 39 Md. 3,; Robertson v. Jones, 71 Ill. 405; McLean County Coal Co. v. Long, 81 Ill. 359; Hilton v. Woods, 4 Eq. 438; Barnsley Canal Nav. Co. v. Twibill, 3 Eng. Railway Cases, 356; Chipman v. Hibbard, 6 Cal. 162; Stockbridge Iron Co. v. Cone Iron Co., 102 Mass. 86; U. S. v. Magoon, 3 McLean, 171; Weymouth v. C. N. R. Co., 17 Wis. 551; Single v. Schneider, 24 Wis. 300, 30 Wis. 570; Winchester v. Craig, 33 Mich, 207; Folsom v. Apple River Log Driving Co., 41 Wis. 608; Herdic v. Young, 55 Penn. St. 177; Lykens Valley Coal Co. v. Dock, 62 Penn, St. 232, and Coleman's Appeal, Id. 278. After reviewing these cases, the court, in the principal case, say: "A careful examination of the authorities has convinced us that there is a growing inclination among all courts, where it can be done, to apply the only safe and just rule in actions for damages, whether *ex contractu* or *ex delicto*, and that is, to give the injured party as near compensation as the imperfections of human tribunals will permit. This is the aim, the ideal, of the law, and it is the duty of courts to come as near it as possible in practice; and although courts differ as to the method of ascertaining the actual loss, as well as to what constitutes actual loss, still there is a refreshing unanimity of opinion that such loss only, when ascertained, ought to be compensated in the absence of fraud, malice, or culpable negligence."

A DECISION of some personal interest to the profession has been made by the Supreme Court of Pennsylvania, in the late case of *Thompson v. Boyle*, the question being the measure of value of legal services. The action was brought by Boyle for professional services. He and one Minor were employed by the plaintiff in error to conduct his defense on an indictment for abortion. Thompson was found guilty, and an application was made for a writ of error by defendant's counsel and denied. An application was made for a pardon, and plaintiff attended before the board of pardons. Services were also rendered at plaintiff's request in the trial of another person, where a *nolle prosequi* was entered. For these services plaintiff and Minor each demanded $5,000. Defendant paid plaintiff $1,300 and Minor $1,000, and refused to pay more. Hence the action. On the trial the court refused to allow one Kaine, a witness and a member of the bar, to answer the following questions: 1. What was the usual compensation charged at the Fayette county bar for defending a prisoner charged in the quarter sessions with felony, where the time consumed in the trial was one day, and where a motion for a new trial and a motion in arrest of judgment were made? 2. What would the services of an attorney be worth to go before the board of pardons at Harrisburg, where the time consumed did not exceed three days in going and returning? The Supreme Court held that these questions were properly put; that the value of the services of a lawyer in a given case may be shown by the testimony of lawyers as to the value of services of counsel, under circumstances of general similarity to those under which the services in question were rendered. "It is true," said the court, "that no two cases are identical, and the amount of labor in the preparation and trial of one will never be precisely the same that may be required in the preparation and trial of any other. And it may be assumed to be equally true that the defendant derived all the advantage from the efforts of his counsel which the highest legal ability and skill could give. And yet, the fact remains that the case presented here is a demand of five thousand dollars by one of two counsel of a defendant charged with a felony, for services rendered upon his trial and in his application for a pardon. The same fee demanded by Mr. Minor would swell the amount to ten thousand dollars. The action was not upon any special undertaking by which the defendant had become bound. It was on a *quantum meruit*. If the fee demanded was such as any usage warrants, it is very clear that poor men charged with crime must defend themselves without professional aid. Whether or not the proceedings were so exceptional as to justify a charge transcending any known usage, would depend on facts to be found by a jury on evidence submitted to them. But professional employment in one

difficult case can not be essentially different from professional employment in another case of equal difficulty. And its value being ascertained in one instance, its value in the other could be at least approximated. The very best means of adjusting this value are the opinions of those who, in earning and receiving compensation for them, have learned what legal services in their various grades are worth. And the fact that the proposition was to adjust the whole value by specific estimates in regard to the different items and details of the general claim, would make the adjustment more satisfactory than an estimate in gross would be. There can be no necessary connection between the trial of an indictment and proceedings to procure a convicted defendant's pardon. Accuracy in the production of results required that the value of the separate services should be separately estimated."

STATE INSOLVENT LAWS.

III.

LAWS IMPAIRING THE OBLIGATION, AND THOSE AFFECTING THE REMEDY OF CONTRACTS.

We have seen that, according to the settled construction of that clause of the tenth section of article I, of the Federal Constitution, prohibiting the enactment of laws by the states which impair the obligation of contracts, all those insolvent or bankrupt laws, which undertake to discharge debtors from liability, without the consent, express or implied, of their creditors, are included within the inhibition. It is fair to assume that the "obligation," which the framers of the constitution had in view, was a *civil*, as distinguished from a mere *moral*, obligation. Were this not the meaning intended, state insolvent laws could in no case be regarded as obnoxious to this objection. They do not purport to relieve the debtor from the moral duty to keep and perform all his promises, but simply undertake to discharge him from legal liability for his failure in this particular.

The meaning of the word "impair" does not seem to present a question of very difficult solution, nor does its difficulty appear to be greatly enhanced by the connection in which it is used. It can not be construed to mean that laws should not be passed destroying or abrogating the obligation of contracts. To impair is not necessarily to destroy. The purport of this provision as interpreted according to the obvious and well accepted meaning of words, is that no state shall pass a law which shall have the effect to release any one from the performance of any previous engagement which he was legally bound to perform, or which shall render that legal duty less binding upon him. There can be no such thing as a legal duty, which is capable of adequate expression in the admonition—"You ought to do" thus and so. Legal obligations are expressed in a more imperative form, and are invariably attended with a means of enforcing the injunction—"You shall." So inseparable are the duties to perform and the means of enforcing the performance of that duty — or, *the remedy* — that we shall find some of the authorities cited below holding that the latter enters into and forms a part of the former. Berley v. Rampacher, 5 Duer, 183; Coffman v. Bank of Kentucky, 40 Miss. 29; White v. Hart, 13 Wall. 646; Conant v. Shaick, 24 Barb. 87; Day v. Wood, Id. 99; Thorn v. San Francisco, 4 Cal. 127; Cargill v. Power, 1 Mich. 369. From these statements we might logically infer that there are constitutional objections to laws imparing the *remedy* of contracts, quite as strong as there are to those impairing the *obligation*. In this position, however, we should hardly be borne out by the language of the decisions by which the interpretation of this clause has been settled. But this conclusion would not be disturbed by those cases where it is merely decided that the constitution does not prohibit a change of remedy. Foster v. Gray, 22 Penn. St. 9; Conkey v. Hart, 14 N. Y. 22; Mech's & Farmers Bank Appeal, 31 Conn. 63; Lennon v. Mayor, &c., of New York, 55 N. Y. 361; State v. Bosworth, 13 Vt. 402; Hoa v. Lefranc, 18 La. Ann. 393; Balt. & Susq. R. R. Co. v. Hartford Bridge Co., 10 How. 511. To change the remedy is not necessarily to impair it. The same is equally true of the obligation. If the obligation can be altered without imparing its strength, it may be done without contravening any provision of the constitution.

The mutuality of a contract renders it exceedingly difficult to conceive of laws affecting its obligation at all which do not impair it to the prejudice of one party or the other. The obligation and the right are correlative,

and as each of the parties thereto has rights, so each is under obligations to the other, which can neither be increased nor diminished by state laws without disregarding the provisions of the portion of the constitution under consideration. "To impair," says Chief Justice McGirk, "in the sense in which it is used in both constitutions, means to alter so as to make the contract more beneficial to one party, and less so to the other, than by its terms it purported to be." Bailey v. Gentry, 1 Mo. 164. See also Brown v. Ward, 1 Mo. 148. So in Robinson v. Magee, 9 Cal. 81, it was decided that whatever provision of a statute substantially defeats the end contemplated by the party, substantially impairs its obligation. And in Walker v. Whitehead, 16 Wall. 314, still stronger language is used by the Supreme Court of the United States. There it is laid down that the laws in existence at the time the contract is entered into, form a part of the contract, whether such laws affect its validity, construction or means of enforcement. The remedy is held to be a part of that obligation, which the constitution protects against impairment by state laws. See also Olcott v. Supervisors, 16 Wall. 314.

For the reason that the remedy may be more variously altered and affected by legislation than the obligation, without impairing it, it may be stated, not only upon authority but sound reason, that laws affecting the remedy are not generally within the scope of the constitutional prohibition. But when their effect, though only directed against the remedy, is to destroy or impair the right, by withholding the means of its enforcement, they are obnoxious to the same objection as though they aimed at an entire discharge of the obligation. De Cordova v. The City of Galveston, 4 Tex. 470; Paschal v. Perez, 7 Tex. 348. So the states can not evade this provision, whether acting through their legislatures or in the exercise of the highest form of popular sovereignty, in constitutional convention, by a total denial of remedies which the law gave the obligee when the contract was made. Jacowy v. Denton, 25 Ark. 625.

It is impossible to reconcile the numerous decisions by which it is held that the remedy cannot be denied without impairing the obligation, with others quite as numerous and authoritative where it is maintained that limitation laws and exemption laws are valid, and may be effectually interposed against the claims of those holding antecedent demands, simply upon the ground that they affect the remedy and not the obligation. Nor is it necessary to follow the courts as they undertake to draw the line dividing *stay laws* which withhold the remedy for a "reasonable time," and are therefore constitutional, from such as withhold it for so long a time as to amount to a substantial denial of any remedy at all, and consequently impair the obligation. But cases have been herein cited indiscriminately where this clause of the constitution has been interpreted and applied to these statutes and to insolvent laws.

The principle upon which the remedy may be altered so as to operate more favorably to one of two parties to an existing contract, without contravening the constitutional prohibition, has been applied to the construction of laws *for the benefit of poor debtors*, or abolishing *imprisonment for debt*, and even where the statute which it was claimed impaired the obligation by affecting the remedy, was simply an *extension of the jail limits*. With a few exceptions, it has been decided that this peculiar remedy may be denied or abridged without impairing the obligation of the contract. Bronson v. Newberry, 2 Doug. (Mich.) 38; Springer v. Foster, 2 Story, 381 (cases cited), Story on Const. 250 (cases cited). See also, Dash v. Van Kleeck, 7 Johns. 477. The case of Bronson v. Newberry, *supra*, was an action upon a bond given for the release of an imprisoned debtor, under a statute in force at the time, but which was subsequently repealed, and the court held that an action could not be maintained thereon, for an escape prior to the repeal of the law.

A statute giving the debtor his election to discharge his debt by a surrender to the creditors of the property purchased instead of paying for it according to the terms of the contract, unquestionably goes beyond the remedy when applied to prior transactions, and destroys the obligation. For *this* reason it is prohibited by the constitution. Abercrombie v. Baxter, 44 Ga. 36. For the same reason as we have already seen by cases cited in a former number of the JOURNAL, a surrender of property by an insolvent debtor to an assignee for the benefit of all his creditors,

would be equally ineffectual to discharge obligations previously assumed. But this does not prevent the passage of laws protecting the property of insolvent debtors, when so assigned, from execution or attachment by non-participating creditors. A statute authorizing a debtor to assign his property for the benefit of creditors, gives neither him, his assignee nor the favored creditors, any rights which he had not at common law. So long as the assignment law does not have the effect to divest the rights of prior lien-creditors, nor deprive them of their ordinary remedies against the debtor, but simply authorizes the assignee to take possession of unincumbered property for distribution, and enables him to hold the same against attacking creditors, it is open to no other objections than might be urged against an ordinary purchase from such insolvent debtor. The statute merely restricts the remedy as to the property assigned. Suits may be prosecuted to judgment, and become liens upon future acquisitions precisely as though the assignment had not been made. Hanford v. Paine, 32 Vt. 442; Cooper v. Bowles, 42 Barb. 87; State v. Keeler, 49 Mo. 548; Kuykendall v. McDonald, 15 Mo. 416. W.

MASTER AND SERVANT.

ELLIOTT v. ST. LOUIS, IRON MOUNTAIN & SOUTHERN R. R. CO.

Supreme Court of Missouri, April Term, 1878.

HON. T. A. SHERWOOD, Chief Justice.
" WM. B. NAPTON, }
" WARWICK HOUGH, } Judges.
" E. H. NORTON, }
" JOHN W. HENRY, }

MASTER AND SERVANT—NEGLIGENCE—DEFECTIVE MACHINERY.—In a suit against an employer by an employee to recover for injuries sustained by the employee, by reason of defective machinery, it is not enough to show that the machinery was defective and that the plaintiff was without fault; it must be shown further that the employer knew, or by the exercise of reasonable care, could have known that the machinery was insufficient.

APPEAL from the Circuit Court of Washington County.

Vail & Donaldson, for appellant; *Crews & Napton*, for respondent.

HENRY, J., delivered the opinion of the court:

The plaintiff's petition alleges that David C. Elliott, father of Mamy, was an employee of defendant and was killed in consequence of the use of defective machinery by the company, on a train of cars of which said Elliott was a brakeman, and it was to recover damages for the killing of her father that Mamy prosecuted this suit. The court and her counsel seemed to have based her right to recover on the second section of our damage act, and in the third instruction for plaintiff, the jury were told, that if they found for plaintiff they should assess the damages at $5,000. Inasmuch as four members of this court adhere to the doctrine announced in the case of Proctor v. H. & St. Jo. R. R. Company, 64 Mo. 112, from which I dissented and still dissent, the judgment herein must be reversed and the cause remanded. Plaintiff's right to recover is derived from the third section of the damage act, and in an action by one authorised to sue by that section, the jury may allow less than $5,000. As the cause will be remanded and probably retried, it is proper to determine another question which is presented by the second instruction given for plaintiff.

The third section of the damage act is as follows; " Whenever the death of a person shall be caused by the wrongful act, neglect or default of another, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or the corporation which would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured."

The fourth section declares what parties may sue and the amount of damages to be recovered.

The second instruction predicates the right of plaintiff to recover upon proof that defendant failed to provide sound and suitable machinery, if Elliott was not negligent, and was ignorant of the defect in the machinery.

The suit can only be maintained when the deceased, if he had lived, could have recovered damages for his injury; and the same evidence as to the cause of the injury is required in a suit by his representative, that would have been required had he survived and sued for the injury. Would proof of the fact that the employee was injured in consequence of the use of defective machinery, of itself, have made a case against the employer at common law? We apprehend not, and if not, neither will it be sufficient in an action authorized by the third section of the damage act.

In the analogous case of an injury received by one through the incompetency of his fellow servant, in a suit against the common employer, " It is," said Napton, J., in McDermott v. Pac. R. R. Co., "well-settled by the English decisions, that the employment of incompetent agents must be traced to the want of ordinary care on the part of the principal." 30 Mo. 116; Beaulieu v. Portland Co., 48 Me. 291. In other words, proof of incompetency of the fellow servant, and that the injury resulted from such incompetency, is not sufficient, but must be supplemented with evidence that the principal did not exercise ordinary care in the employment of such incompetent servant.

The first instruction for plaintiff recognizes the

law, as we understand it, by declaring that plaintiff had a right to recover on proof that the injury was occasioned by the use of defective machinery, and that defendant was aware of this defect, or that the exercise of reasonable care by defendant would have disclosed it. The doctrine is recognized in Gibson v. Pac. R. R. Co., 46 Mo. 166; Dale v. St. L., K. C. & N. R. R. Co., 63 Mo. 45; McDermott v. Pac. R. R. Co., 30 Mo. 116; Dewitt v. Pac. R. R. Co., 50 Mo. 305.

In nearly all the cases of suits by employees against employer for injuries received by the former, in consequence of defective machinery, the right of plaintiff to recover has been held to depend upon proof that the employer knew of the defect, or by the exercise of reasonable care could have ascertained it. McMillan v. Saratoga & Washington R. R. Co., 20 Barb. 449; Kergan v. Western R. R. Corporation, 4 Seld. 175; M. R. & L. E. R. R. Co. v. Barber., 5 Ohio St. 541; Sherman and Redfield on Negligence, § 99. The question of the vigilance of the defendant was ignored by the court in the plaintiff's second instruction, which was, therefore, erroneous.

The judgment is reversed and the cause remanded. All concur.

NOTE.—We are at a loss to know just what the decision in the Proctor case has to do with a case like the foregoing, and the ground of dissent is not obvious. The second section of the damage act expressly limits the recovery therein authorized, where the injury was occasioned by defective or insufficient machinery, to passengers. An employee must resort to the third section in such cases. Of this there never has been any controversy. The controversy has been as to the proper construction of the first part of the second section, which gives a right of action for injuries resulting from the negligence of employees managing machinery.

PROMISSORY NOTE — LIABILITY OF MAKERS FOR NOTE OF CORPORATION.

AIMEN v. HARDIN.

Supreme Court of Indiana, May Term, 1878.

HON. WILLIAM E. NIBLACK, Chief Justice.
" HORACE P. BIDDLE, }
" JAMES L. WORDEN, } Associate Justices.
" GEORGE V. HOWK, }
" SAMUEL E. PERKINS, }

1. NOTE OF CORPORATION—PERSONAL LIABILITY OF MAKERS THEREON.— Where a note read: "The directors of the H. T. Company promise to pay," etc., and was signed by the directors of said company, *held*, this was the note of the corporation and not that of the individuals who signed it.

2. AMBIGUOUS CONTRACT — INTERPRETATION OF. —Where the language of a contract is indefinite or ambiguous, the interpretation which the parties themselves have given to it, by their conduct, will prevail.

WORDEN, J., delivered the opinion of the court:

Action by the appellee against the appellants. Demurrer to the complaint, for want of sufficient facts, overruled and exception. Issue tried by the court, and finding and judgment for plaintiff. New trial denied, and exception.

The complaint was in two paragraphs. The first alleged that the defendants executed to the plaintiff the following promissory note, viz:

"July 19th, 1867.

"$600. Nine months after date the directors of the Huntsville Turnpike Company promise to pay Lucinda Hardin, or order, the sum of six hundred dollars, for value received, waiving the benefit of the valuation or appraisement laws, with ten per cent. interest from date.

(Signed) G. N. DAVIDSON, B. F. AIMEN, J. A. ANDERSON, } Directors.

That some payments had been made upon the notes, and that the plaintiff had obtained judgments for the residue against the Huntsville Turnpike Company, and had caused an execution to be issued upon the judgment, which had been returned by the sheriff of said county unsatisfied, and indorsed "no property found on which to levy this writ, or any part thereof;" that said Turnpike Company has no property of any kind out of which she can collect her said judgment, or any part of it. And she further avers that at the time of executing said note said company had no solvent stock out of which to pay said debt so contracted.

The second paragraph was much like the first. It alleged the recovery of the judgment against the company for the amount due upon the note, the issuing of an execution thereon, and the return of the same, as in the first paragraph, and it contained the same allegations as to want of "solvent stock" at the time of the execution of the note.

The action was evidently based upon section 25 of the act authorizing the construction of plank, etc., roads, 1 R. S. 1876, pp. 654, 662, which reads as follows: "The directors of any company that may be formed under the provisions of this act, shall be liable in their individual property for any debt they may contract in the name of the company, over and above the solvent stock of such company."

It is claimed that the complaint was bad, because it did not aver that the defendants were directors of the company at the time the debt in question was contracted. This, doubtless, should be shown by the complaint, but it seems to us to have been sufficiently shown. The note executed by the defendants purports to have been executed by them as directors of the company. This shows sufficiently that they were then directors. It will not be presumed, in the absence of any averment or showing to that effect, that the debt was contracted previous to the execution of the note.

The objection to the complaint is not well taken. But the motion for a new trial should have prevailed. It devolved upon the plaintiff to show, in order to hold the defendants personally liable, that, at the time the debt was contracted, it exceeded the solvent stock of the company.

There was no evidence on this point given by the plaintiff, but, on the contrary, it was proved, on the part of the defendant, that, at the time of the

execution of the note, the company owed no other debts, and that, at that time, there was $1,750 of solvent stock unpaid."

It is claimed, however, by the appellee, that the defendants are personally liable upon the note as the makers thereof, without reference to the statute above set out.

The note would seem to have been the note of the company, and not that of the directors who signed it. The promise was made by them as directors of the company, and not as individuals. Pearse v. Welborn, 42 Ind. 331. See also Hays v. Crutcher, 45 Ind. 260. But if the point were doubtful the plaintiff, herself, has put a practical construction upon the note by treating it as the obligation of the corporation, and not that of the individuals who signed it as directors. She has sued the corporation upon it, and obtained judgment. It is said in a late work by a well-known legal writer that, "in a doubtful case, the interpretation which the parties themselves have, by their conduct, practically given their contract, will prevail." Bishop on Contracts, sec. 598.

In the case of Chicago v. Sheldon, 9 Wall. 50, 54, it was said by Mr. Justice Nelson, that, "in cases where the language used by the parties to the contract, is indefinite or ambiguous, and hence of doubtful construction. the practical interpretation by the parties themselves is entitled to great, if not controlling influence." Morris v. Thomas, 57 Ind. 316.

We need not decide whether the plaintiff would be absolutely estopped to claim that the note was the obligation of the individuals who executed it as directors, she having sued upon it as the obligation of the company, and recovered judgment, but we think it clear that under the circumstances the note should be regarded as the obligation of the company, and not of the individuals who signed it. This accords with the reasonable construction of the instrument itself, and the interpretation put upon it by the plaintiff. Judgment reversed and cause remanded for a new trial.

COVENANT BY GRANTEE TO ASSUME PAYLENT OF MORTGAGE—OWNER OF MORTGAGE—RELEASE.

WHITING, v. GEARTY.

Supreme Court of New York, First Department.

[Filed at New York, August, 1878.]

Hon. NOAH DAVIS, Presiding Judge.
" JOHN R. BRADY, } Judges.
" CHARLES DANIELS, }

WHERE a grantee by a clause in the deed of conveyance assumes payment of an outstanding mortgage, he is charged with a personal liability to the owner of the mortgage, and that liability can not be released by the grantor, through whose instrumentality it was created, after it has become known to the party intended to be benefited by it.

Appeal from so much of the judgment recovered in the action as adjudges the defendant, Gearty, to be liable for any deficiency unpaid after the sale of the mortgaged premises.

DANIELS, J., delivered the opinion of the court:

The action was brought for the foreclosure of a mortgage on premises in the city of New York, made by Joseph L. T. Smith and George H. Smith to James R. Whiting, deceased, to secure the sum of ten thousand dollars.

J. L. T. Smith and wife, and Geo. H. Smith and wife, afterwards conveyed the mortgaged premises to Thomas Gearty. The deed contained the following clause: "Subject, nevertheless, to two certain indentures of mortgage, amounting in the aggregate to $15,000, which the party of the second part hereby agrees to assume and pay off, the same being a part of the consideration of this conveyance."

The mortgage sought to be foreclosed is one of the mortgages referred to. Joseph L. T. Smith and Geo. H. Smith, by an instrument dated December 13, 1876, released and discharged the said Thomas Gearty from his assumption of the payment of the mortgage in question. The complaint prays for a deficiency judgment against Thomas Gearty. The answer of Thomas Gearty sets up the release, and asks that in so far as the complaint prays for a deficiency judgment against him, the prayer of the complaint be denied. The court, at special term, directed the usual judgment of foreclosure, and also that the defendant, Thomas Gearty, pay to the plaintiff any deficiency that might arise.

The release was executed after the obligation of the defendant had become known to the plaintiff, and after the commencement of this action, one of the objects of which was to enforce the liability created by means of it. The effect of the deed and the acceptance of it by the defendant, was to bind him personally to the performance of the obligation mentioned in it; and that was to pay off the mortgages assumed by the grantee. With the mortgage in suit the grantors had executed their bond for the payment of the debt. They had become personally bound themselves, and for that reason, within the earlier as well as the later cases, the clause by which the defendant, as grantee, assumed payment of the same debt, charged him with a personal liability to the owner of the mortgage. Trotter v. Hughes, 2 Kernan, 74; Belmont v. Cowan, 22 N. Y. 438; Burr v. Beers, 24 N. Y. 178: Ricard v. Sanderson, 41 N. Y. 179; Thorp v. Keokuk Coal Co., 48 Id. 953; Thayer v. Marsh, decided by this general term, July, 1877. And in that respect the case differs from the agreements for indemnity, which formed the subject of consideration in Simson v. Brown, 13 N. Y. Supreme Court Reports, 251, which was afterwards reversed by the court of appeals, and Merrill v. Green, 55 N. Y. 270.

The question, and the only question in this case, is whether that liability can be released by the grantor, through whose instrumentality it was created, after it has become known to the party intended to be benefited by it, and he has brought his action to enforce it.

In the absence of notice of its existence, or acceptance of the obligation by the party to whom

payment is to be made, it has been held that it may be released by the person creating the obligation. Kelly v. Roberts, 40 N. Y. 432. But that was deemed to result from the circumstance that no privity, under those circumstances, existed between the grantee and the person whose debt was agreed to be assumed by him. A clear implication is to be derived from the opinion of the court in that case, that a different conclusion would have been required if the creditor had appeared to have accepted the substituted liability. The only authority in which it has been held that notice and acceptance of the liability did not prevent the grantor from releasing the grantee from the performance of the agreement to pay, is that of Stephens v. Casbacker, 15 N. Y. Sup. Court Rep. 116. But that was decided by a divided court, and seems to be opposed to the intention and effect of the agreement made, after it has been followed by the acceptance of the creditor. In deciding the case of Garnsey v. Rogers, 47 N. Y. 233, it was said by Judge Rapello, in the course of the opinion of the court, which was delivered by him, that where such an assumption is made on an absolute conveyance of land, it is unconditional and irrevocable. The grantor can not retract his conveyance, or the grantee his promise or undertaking. Ib. 242. Which, however, was probably designed to be subject to the understanding that the agreement should first come to the knowledge of, and be accepted by, the creditor whose debt was to be paid. For, before that there would be no privity of contract between the parties immediately interested in the new agreement. But by such acquiescence and acceptance the creditor makes himself a party to the agreement intended for his benefit. He adopts the promise made to the grantor for him, and is afterwards entitled to insist upon the performance of it. Upon this subject Earl, Com'r. in his opinion in the case of Thorp v. Keokuk Coal Co., *supra*, said that, "it is sufficient if the promise be made by the promisor upon a sufficient consideration passing between him and his immediate promisee, and when the third person adopts the act of the promisee, in obtaining the promise for his benefit, he is brought into privity with the promisor, and he may enforce the promise as if it were made directly to him." Id. 257. The right of action, upon the promise in that event, rests in the person whose debt has been agreed by it to be paid by the person making it. And from that time the only person who can release and discharge it is the individual in whom the right of action to enforce it has become vested. The obligation then becomes a subsisting right of action, which he can not afterwards be deprived of by the unauthorized act of the party inducing the promise. Green v. Burke, 23 Wend. 490, 496; McKnight v. Dunlop, 1 Selden. 537. It was there held to be a general legal proposition that, "whenever a right of action has once vested in a party, it can only be destroyed by a release under seal, or by the receipt of something in satisfaction of the wrong done." Id. 544.

The release here referred to must, of course, be that of the party vested with the right. The right of action can properly be discharged only by him, or some one acting under his authority. And that was not done in this case. The weight of authority, as well as the sound reason of the case, are both opposed to the legal validity of the instrument upon which the defendant rested for his defense. The transaction had gone beyond the power of the grantors in the deed, by the acceptance of the liability imposed upon the grantee for the benefit of the mortgagee. For that reason the case of Stephens v. Casbacker, *supra*, should not be followed, but the judgment appealed from should be affirmed.

DONATIO CAUSA MORTIS— INDORSEMENT OF CERTIFICATE OF DEPOSIT.

HASSELL v. BASKET.

United States Circuit Court, District of Indiana, October Term. 1878.

Before Hon. WALTER Q. GRESHAM, District Judge.

ONE C, the owner of a bank certificate of deposit, some sixty days before his death, indorsed it as follows; "Pay to Martin Basket, of Henderson, Ky., and no one else, then, not till my death. My life seems to be uncertain; I may live through this spell, then I will attend to it myself. (Signed) Chaney," and delivered it to said Basket. *Held*, that the latter could not hold it as a valid *donatio causa mortis* nor as a testamentary gift.

A. & J. E. Iglehart and *T. T. Foreman*, for complainant; *Shackelford & Richardson*, *Denby & Kumler*, *J. W. Gordon* and *J. J. Turner*, for respondents.

GRESHAM, J.:

The bill in this case alleges that Hillery M. Chaney, a citizen of Sumner county, Tennessee, on the 8th day of September, 1875, deposited in the Evansville National Bank, at Evansville, Indiana, $23,514.70, taking a certificate of deposit therefor; that in January, 1876, said Chaney suddenly died, and the plaintiff was appointed his administrator; that the defendant, Martin Basket, who was a nephew of said Chaney, by a fraudulent combination with one Bryan, whose wife was a niece of said Chaney, obtained possession of said certificate of deposit, and refused to surrender the same on demand; that no consideration of any kind passed from said defendant Basket to said Chaney for said certificate; that said Basket claimed to hold the same by gift from said Chaney, but at the time of such alleged gift, and for a long time previously, the said Chaney was of unsound mind. The National Bank, its president and cashier, and Messrs. Shackelford and Richardson, attorneys, who, as the counsel of the defendant, Basket, have possession of the certificate, are made defendants.

The defendant, Basket, by his answer admits the possession of the certificate, and alleges that the said Chaney, sixty days before his death, then being in full possession of all his mental faculties, but in apprehension of death from a disorder with which

he was then suffering, with his own hand wrote and signed the following certificate, to wit:

"Pay to Martin Basket, of Henderson, Ky., and no one else, then, not till my death. My life seems to be uncertain. I may live through this spell, then I will attend to it myself.

(Signed) CHANEY."

And delivered said certificate so indorsed to the defendant, Basket; that said Chaney died of said disorder, and said certificate, so indorsed, remained in his (Basket's) possession until he placed it in the hands of his counsel, the defendants, Shackelford and Richardson; and that the certificate was a gift to him in trust, as well for himself as for his brothers and sisters, at his option.

The bank and its officers answered, asking protection of the court in the payment of the money. Basket filed a cross-bill, setting up the gift as in his answer, which the plaintiff answered, traversing the material allegations. General replications were filed to all the answers.

For several years before his death Mr. Chaney had been in failing health, complaining of dyspepsia, and physicians had treated him for that disease. During the sixty days that elapsed from the delivery of the endorsed certificate to Basket until his (Chaney's) death, on the —— day of January, 1876, he was generally up about his premises looking after his business, as he had done for months previously. It appeared from a *post mortem* that he had also suffered from consumption. The testimony also conclusively shows that, at the time the certificate was delivered by him to Basket, the said Chaney was not *in extremis*, and that he did not act in the apprehension of immediate death. On this point there was no serious controversy.

His domicil being in the State of Tennessee, at the time of his death, the laws of that state determine the succession to his personal property. In construing the statutes of Tennessee, relating to wills, the supreme court of that state has held that nuncupative wills must be made *in extremis*. Hatcher v. Millard, 2 Cold. 30; Gwin v. Wright, 8 Humph. 639. Section 2,165, of the Tennessee code, declares that no nuncupative will is good unless proved by two witnesses present at the making thereof, who were specially requested to bear witness to it by the testator. The endorsement on the certificate has never been probated as a testamentary instrument according to the requirements of the laws of the State of Tennessee. It follows that the defendant, Basket, can not claim the money as a testamentary gift.

The plaintiff, as administrator, is, therefore, entitled to the fund in controversy, unless it belongs to the defendant, Basket, as a gift *causa mortis*. It would seem that the courts and law-writers have not always been clear in speaking of gifts of this kind.

In Kent's Commentaries, Vol. 2, mar. p. 444, we find the following: "Such gifts are conditioned like legacies, and it is essential to them that the donor make them in his last illness, or in contemplation and expectation of death, and, with reference to their effect after his death, they are good, notwithstanding the previous will, and if he recovers the gift becomes void." In Story's Eq., sec. 605 and 606, note 1, the gift is thus defined: "It is properly a gift of personal property by a party who is in peril of death, upon condition that it shall presently belong to the donee in case the donor shall die, but not otherwise. To give it effect there must be a delivery of it by the donor, and it is subject to be defeated by his recovery or escape from the impending peril of death. If no event happens which revokes it, the title of the donee is deemed to be directly derived from the donor in his life time, and therefore in no sense is it a testamentary act."

Williams, in his treatise on Executors, in speaking of this kind of gift, Vol. 1, page 651, says: "First—The gift must be with a view to the donor's death. Second—It must be conditional, to take effect only on the death of the donor, by his existing disorder. Third—There must be a delivery of the subject of the gift." In Nicholas v. Adams, 2 Whart. 17, the opinion of the court was delivered by Chief Justice Gibson, who says: "*Donatio causa mortis* is sometimes spoken of as being distinct from a gift *inter vivos;* the former having been sometimes supposed to be made in reference to the donor's death, and not to vest before it, but inaccurately, as it seems to me, as this gift, like every other, is not executory, but executed in the first instance by delivery of the thing, though defeasable by reclaimation, the contingency of survivorship or deliverance from peril. The gift is consequently *inter vivos*." Gifts *causa mortis* must be of personal property or choses in action actually delivered by the donor to the donee, in apprehension of approaching death from an existing disorder or other impending peril, and death must ensue from existing disorder, or other impending peril, without any complete intermission. But without further effort to define such gifts it is sufficient to say that they are not good and are never upheld without certain essential requisites, one of which is delivery, actual or constructive, to the donee, or some one in trust for him, of the subject matter of the gift. If the subject of the gift be capable of actual delivery, the delivery must be actual. Such gifts afford tempting opportunities for fraud, and, therefore, the Roman law requires them to be executed in the presence of five witnesses. And, inasmuch as delivery lessons the opportunity for fraud, it has always been held an absolute requisite to their validity. Money on deposit may be delivered by a delivery of the certificate of deposit, provided there be the intention at the time to transfer to the donee the dominion and ownership. It is now settled that choses in action, whether negotiable or not, may be the subjects of gifts *causa mortis*. Brunson v. Brunson, Meigs' Rep. 633; Brown v. Moore, 3 Head, 671; Meach v. Meach, 24 Vt. 591; Hanson v. Millett, 55 Me. 184; Cutting v. Gilman, 41 N. H. 151."

The money itself was not delivered to Basket, nor was the certificate so assigned to him as to enable him to get possession of it. With the certificate, as indorsed, he had no right to demand the money from the bank. If, on his demand, the bank had paid the money, such payment would not have

protected the bank against another demand by the donor. The indorsement was not of such a character as to enable him therewith to reduce the money to his possession. He could not, by virtue of the indorsement, have compelled the delivery of the money to him by the bank during the life of the donor. The donor, by the indorsement, had not parted with the possession or dominion of the property. It was still under his control. The language of the indorsement is certainly inartistic, but its meaning is patent. In legal effect it is: "If I die in my present illness, this certificate of deposit shall belong to Martin Basket. When I thus die, and not before, it shall be paid to him." With this clear intention of the donor not to part with his money as long as he lived, it will not do to say that delivery of the certificate was a constructive delivery of the money evidenced by it.

But it is said that the subject of a gift *causa mortis* vests in the donee only at the death of the donor, and that, therefore, the condition expressed in the assignment would have been delivered with a blank indorsement, or no indorsement at all. It must be conceded that some of the authorities seem to support this view.

A will is the disposition of one's estate, to take effect after his death. Any disposition of property to take effect upon the death of the owner or donor is testamentary. It is of the essence of a bequest that it take effect on the death of the testator. It appears by the very terms of the assignment that no present title or interest in the money could pass to the donee during the life of the donor. No instrument of writing can be both a last will and testament, and a gift *causa mortis*. The indorsement was testamentary in character, and if it had been properly executed according to the statutes of Tennessee, it doubtless might have been probated as the donor's will. There is a wide difference between a legacy and a gift. Both possession and title must pass to the donee to constitute a gift. This applies as well to gifts *causa mortis* as to gifts *inter vivos*. This title must pass *inter vivos*, or it never can pass, but will go to the donor's legal representative. In a gift *inter vivos*, the donor reserves no right of revocation; in a gift *causa mortis* he does. The donee of a gift *causa mortis* holds the thing given not as bailee of the donor, but as present owner on the condition attached to such gifts. A gift *causa mortis* vests in the donee a present but inchoate, or defeasible title until the happening of the event necessary to render it absolute, and therein it differs from gifts testamentary and *inter vivos*. This question is discussed in Gass v. Simpson, 4 Cold. Tenn. 393. "The property," say the court, "must pass at the time and not be intended to pass at the giver's death. * * * * At the death of the donor the title becomes complete and absolute from the date of the gift, and that without any consent or other act on the part of the executor or administrator; consequently, the gift is *inter vivos*." Duncan v. Duncan, 5 Littell, 12. In Parish v. Stone, 14 Pick. 198, the transfer of choses in action as gifts *causa mortis* is discussed. "These cases," said Chief Justice Shaw, in delivering the opinion of the court, "all go on the assumption that a bond, note or other security is a valid subsisting obligation for the payment of a sum of money, and the gift is in effect a gift of the money, by a gift and delivery of the instrument which shows its existence and affords the means of reducing it to possession."

In the case at bar, the certificate was delivered as the language of the endorsement clearly shows, with no intention of a present gift of the money, with authority to the donee to reduce it to possession. On the contrary, the indorsement was of such a character as to absolutely prohibit the donee from claiming any present title to the money, or any right to reduce it to his possession during the life of the donor.

The decedent lived in Nicholas county, Kentucky, the place of his birth, until 1871, when he was sixty years old. He was married to Miss Hanby in 1832, with whom he lived thirty-six years, and by whom he had seven children, five of whom, one son and five daughters, grew up, married and settled near their parents. During these thirty-six years, by industry, economy and good judgment, an estate worth some $50,000 was accumulated. The evidence shows that the decedent was an eccentric man, and his widow testified that he was always a hard man to get along with. In 1868 he seems to have become fascinated with a woman named Nancy Hyatt, with whom he established immoral relations, which fact became known to the public and his family. The wronged wife's remonstrances and entreaties were of no avail in winning back to his family the faithless and unfeeling husband and father. Not content with the foul injustice already inflicted upon his family, he showed himself utterly insensible to every sentiment of affection and honor by publicly attacking the chastity of his wife and denying the paternity of all but one of his children. It is not pretended that there was the slightest foundation for this monstrous slander, and naturally enough a separation ensued, when the property was divided by agreement, the wife and children getting the home farm, worth about $8,000. Previous to this strange infatuation with the Hyatt woman, the decedent had the respect and esteem of his neighbors, and previous to that time the evidence fails to show that he was not attached to his family. Shortly after the separation and division of the property we find the decedent and Nancy Hyatt in Hancock county, Indiana, where, after a residence of only four months, by a fraud on the jurisdiction of the court, he succeeded in having a decree of divorce entered in his favor, and straightway he and the Hyatt woman went through the formality of a marriage. Immediately after this the decedent and his pretended wife removed to Sumner county, Tennessee, and settled upon a farm, where they separated, after having lived together some two years.

The money on deposit, it is claimed, was given to the defendant Basket, a nephew, when no one was present but the alleged donor and donee, and

the remainder of the decedent's estate all went to other collateral relations. In such a contest it must not be thought strange if the donee is held to the strictest proof of his title. The outraged wife and children who had a natural claim upon the decedent's bounty will not appeal to a court of equity in vain, unless their adversary has established his right to the money in dispute by the most convincing testimony.

The allegation of mental unsoundness is not sustained by the evidence—it would be well for the memory of the decedent if it were.

These views render it unnecessary to consider other questions which were argued with ability by counsel on both sides.

Decree that the certificate of deposit be delivered to the complainant, and that the money evidenced by it be paid to him.

INJURY TO CHILD — IMPUTED NEGLIGENCE OF PARENT.

MORGAN v. ILLINOIS & ST. LOUIS BRIDGE COMPANY.

HAGAN'S PETITION.

United States Circuit Court, Eastern District of Missouri, September Term, 1878.

Before Hon. JOHN F. DILLON, Circuit Judge.

1. LIABILITY FOR INJURY CAUSED BY CHILD FALLING INTO DANGEROUS EXCAVATION — BURDEN OF PROOF.—The railway tunnel connecting the Union depot in St. Louis with the Illinois and St. Louis Bridge was, at a point where it was uncovered, and within the line of a public street, left unguarded, exposing a perpendicular wall fourteen feet in depth below the surface of the street. The petitioner, a boy four years of age, strayed away from his home, about two blocks distant, under circumstances not disclosed by the testimony, fell into this excavation, and sustained a fracture of the thigh bone. It appeared: (1.) that his parents were poor and unable to employ a servant to look after him; (2.) that he sustained no other injury except physical pain and suffering; (3.) that the tunnel was in custody of receivers of this court. *Held* (1.), that the unguarded excavation was a nuisance, the continuing of which rendered the receivers liable to pay out of the fund in their charge damages for any injury of which it was the proximate cause; (2.) that the petitioner was in law incapable of negligence, and that the burden of showing contributory negligence on the part of the parents, such as, imputed to the petitioner, would bar a recovery, rested with the respondents.

2. THE MERE FACT THAT A CHILD four years of age strayed a distance of more than two blocks from home at play with other children, is not of itself evidence of contributory negligence on the part of its parents.

3. DAMAGES MAY BE GIVEN in such a case where there is no other substantial element than physical suffering.

This action was brought in the form of an intervening petition in a suit in equity, which had been brought to foreclose a mortgage. This peculiar form of suit was necessitated by the fact that the property, the negligent construction of which produced the injury complained of, was in the hands of receivers appointed by this court. By consent of counsel the petition was referred to Seymour D. Thompson, Esq., one of the Masters in Chancery of the court, who reported as follows:

"From the testimony I find the following facts: That, on the first day of November, A. D. 1876, the receivers of this court, John P. Morgan and Solon Humphreys, were operating the structure known as the St. Louis Tunnel, connecting the Illinois and Saint Louis Bridge with the Union Depot, in the city of St. Louis. That the said tunnel, as originally constructed, debouches from beneath the ground in the middle of Eighth street, in St. Louis, at the crossing of Clark avenue, and runs southwardly in the centre of Eighth street to Spruce street, which crosses it by means of a bridge; from which point said tunnel continues south, a short distance, and then gradually deflects to the west, so that the western side of it crosses the western line of Eighth Street, at a point one hundred and forty-seven feet south of the Spruce street bridge. The uncovered portion of said tunnel thus runs within the limits of Eighth street for a distance of two blocks. The wall of said tunnel is surrounded by a flat coping of stone about on a level with Eighth street, along which is built an iron railing, designed to protect men and animals traveling along the street from falling into it. At a point about three feet north from where the western wall of the tunnel intersects the line of Eighth street, in deflecting to the west, as already stated, this railing, at the time of the accident in controversy, stopped. At the point thus left unguarded within the line of Eighth street, the distance to the bottom of the tunnel was about fourteen feet. Beyond the point where the western wall of the tunnel crosses the western line of Eighth street, the coping descends in the form of a stairway, at an angle of 45°. A rough sketch returned into court, marked "Exhibit A to Testimony," gives a fair idea of the geography of the tunnel, as thus described. The road which runs along the western side of the open tunnel in Eighth street is, by this curve in the tunnel, deflected to the west, over private ground, and is a constantly traveled thoroughfare.

"On the date already mentioned, November 1st, 1876, the intervening petitioner, John Hagan, was between three and four years of age. He lived with his parents upon Clark avenue, near Ninth street, a little more than two blocks distant from the point where the western wall of the tunnel crosses the western line of Eighth street, as already indicated His parents were poor. His mother was obliged to do her own housework, and they were unable to employ a nurse or servant to take care of him. He strayed from home, and, while at play with other children upon the unguarded coping of the tunnel, at the point already indicated, just within the line of Eighth street, fell into the tunnel and received a simple fracture of the thigh bone. This fracture is well healed; the leg is not shortened nor the limb deformed except by

a slight callous, which will gradually be absorbed. I find from the evidence that the petitioner received no other injuries from this fall than physical pain and suffering.

"Upon this state of facts three questions would seem to arise:

"1. Were the receivers guilty of negligence in permitting a portion of the wall of the tunnel to remain unguarded at a point within the line of a public street constantly traveled, where the wall was perpendicular, where the excavation was fourteen feet deep, and through which trains were constantly passing? On this point I entertain no doubt. It seems to me clear that the tunnel company, leaving a portion of so dangerous an excavation unguarded, at such a point, were the authors of a public nuisance, and that the receivers were continuers of it.

"2. Was there contributory negligence imputable to the plaintiff, such as should bar a recovery of damages? Childen at the tender age of the plaintiff at the time of the injury complained of, are in law incapable of negligence;[1] but the weight of authority is that the negligence of the parent, guardian, or other person lawfully in custody of a child which is injured, will be imputed to the child so as to bar a recovery of damages;[2] yet some courts deny this, and upon grounds which seem entitled to much consideration.[3] Whatever may be the correct rule on this subject, it is clear upon authority that parents situated as the parents of the plaintiff were—poor, the father absent at his daily labor, the mother obliged to do her own house work, unable to employ a nurse or servant to attend the child when upon the street—will not be deemed guilty of such negligence as will prevent a recovery of damages if the child is injured through the negligence of the defendant while straying upon the street unattended.[4]

"3. In such a case will damages be given on account of physicial suffering, where there has been no direct pecuniary loss? Upon this point I have some difficulty; but the tendency of the courts seems to be to sustain verdicts where the plaintiff received no substantial injury except physicial pain and mental suffering, unless the verdicts are so excessive as to create a presumption that that the jury acted from passion or from prejudice;[5] and whether such damages are called 'exemplary damages,' or 'smart money,' or 'compensation for injured feelings," seems to be more nearly a debate about terms and definitions than about any substantial differences which are capable of being traced and maintained in the administration of justice.[6] All the American courts seem agreed that

(1.) O'Flaherty v. U. Ry. Co., 45 Mo. 70; Hartfield v. Roper, 21 Wend. 615; Mangam v. Brooklyn R. R. Co., 38 N. Y. 455; North P. R. Co. v. Mahoney, 57 Pa. St. 187.

(2.) Hartfield v. Roper, 21 Wend. 615; Waite v. N. E. Ry. Co., 28 L. J. (Q. B.) 258; O. & M. Ry. Co. v. Stratton, 78 Ill. 88; P. & F. W. Ry. Co. v. Vining, 27 Ind 513; Lafayette, etc., Ry. Co. v. Huffman, 28 Ind. 287; I. M. Ry. Co. v. Rowen, 40 Ind. 455; Kass v. Park, 40 Cal. 188; Fallon v. Cent. Park, etc., Ry. Co., 64 N. Y. 13; Mangam v. Brooklyn Ry. Co., 38 N. Y. 455; Callahan v. Bean, 9 Allen, 401; Wright v. Malden, etc., Ry. Co., 4 Allen, 283; Munn v. Reed, 4 Allen, 431; L. & P. Canal Co. v. Murphy, 9 Bush. 522: Down v. N. Y. Central Ry. Co., 47 N. Y. 83; Drew v. Sixth Av. Ry. Co., 26 N. Y. 49.

(3.) Daly v. Norwich, etc., Ry. Co. v. Conn. 591; Gov. St. Ry. v. Herndon, 53 Ala. 70; Norfolk Ry. Co. v. Ormsby, 27 Gratt. 455: Philadelphia, etc., Ry. Co. v. Long, 75 Pa. St. 257.

(4.) "People in the situatlion of life of those who had custody of the child," said Wagner, J., in a similar case, "can not always attend to it strictly; and if it escapes from them unawares, it must not be injured simply because it so escapes." Isabel v. Han., etc., Ry. Co., 60 Mo. 483. In another case the same learned and humane judge, discussing this question, said: "To say that it is negligence to permit a child to go out to play, unless it is accompanied by a grown attendant, would be to hold that free air and exercise should only be enjoyed by the wealthy, who are able to employ such attendants, and would amount to a denial of these blessings to the poor." O'Flaherty v. Union Ry. Co., 45 Mo. 74. In a case very similar to this, another very learned and capable judge used the following language: "The doctrine which imputes the negligence of the parents to the child in such a case as this is repulsive to our natural instincts, and repugnant to the condition of that class of persons who have to maintain life by daily toil. It is not the case where the positive act of a parent or guardian has placed a child in a position of danger necessarily requiring the care of the adult to be constantly exercised, as where a parent takes a child into the cars, and, by his neglect, suffers it to be injured by straying off upon the platform. But here a mother, toiling for her daily bread, and having done the best she could in the midst of her necessary employment, loses sight of the child for an instant, and it strays upon the track. With no means to provide a servant for the child, why should the necessities of her position in life attach to the child, and cover it with blame? When injured by positive negligence, why should it be without redress? A negligent wrong is done; it is incapable of contributing to it; then why should the wrong not be compensated?" Agnew, J., in Kay v. Penn. Ry. Co., 65 Pa. St. 276. The same views are re-asserted in Phila., etc., Ry. Co. v. Long, 75 Pa. St. 257.

(5.) Sedgwick on Damages, 6th Ed., 699, note 2; Trimble v. Spiller, 2 Munroe, 394; Huckle v. Money, 2 Wils. 205; Beardmore v. Carrington, 2 Wils. 244.

(6.) Hendrickson v. Kingsbury, 21 Iowa, 378; Detroit Post Co. v. McArthur, 16 Mich. 447; Fay v. Parker, 53 N. H. 342, 381: McKinney v. C. & N. W. R. Co., 44 Iowa, 321. Thus, in Littlefield v. Atlantic & Pacific R. Co., Intervention of McAuley, the learned district judge, sitting in this court, awarded an old man $500 as damages on account of having been wrongfully expelled from a passenger train of the receivers by its conductor, and compelled to walk three miles, crossing a high and dangerous bridge, to get to his home. This was held a case for *exemplary damages*. On the other hand, in West v. Forrest, 22 Mo. 344, the defendant, in beating a female slave, accidently inflicted some blows upon her mistress, the plaintiff. There does not appear to have been any attempt to prove that the plaintiff had suffered any direct pecuniary loss. The court sustained a verdict for $400, saying: "The plaintiff's case was fully made out before the jury, and by their verdict of four hundred dollars they exhibited their sense of such a wrong, and properly vindicated the injuries and wounded feelings of the plaintiff." In Crocker v. Chicago & N. W. R. Co., 36 Wis. 657, a railway conductor kissed a female passenger. Here was certainly no direct pecuniary loss; but the company was compelled to pay $1,000 for it. The damages were expressly placed upon the ground of *compensation*.

physicial suffering may be considered by the jury in estimating damages, even where the negligence was not gross nor the injury so willful as to warrant the giving of what are termed exemplary damages."[7]

The report concluded by recommending a decree that the receivers pay the petitioner out of the funds in their hands, $500 and costs.

Exceptions were filed to the foregoing report by the receivers, and on those exceptions the cause was submitted to the court.

Glover & Shepley, for the receivers; *A. R. Taylor*, for the petitioner.

DILLON, Circuit Judge:

The only exception to the Master's report relied on by the counsel for the receivers, is that the Master erred in not finding that the parents of John Hagan were negligent, and that such negligence defeats the right of the infant to recover the amount of the damages sustained by the negligence of the receivers. In the excellent report of the Master, the principal cases upon the effect of the negligence of parents in defeating the right of action for a negligent injury to their child, are collected. They can not be entirely reconciled, although when the facts of the particular cases are considered, the discrepancy is not as great as at first it would appear to be.

Upon the facts in this case, we entertain no doubt that the petitioner is entitled to compensation for the injury he sustained. The deep, unguarded excavation in the street was not only a public nuisance, but a dangerous one. The receivers ought not to have permitted it to continue. The natural instincts and habits of children lead them to play, and it is scarcely possible, and certainly not practicable, to keep them entirely off the streets or under constant supervision. The injury here was not caused by any person or agency in the lawful use of the street. What right has the Tunnel Company to leave a dangerous pitfall in the public way, and then to insist that all the children in the neighborhood shall be imprisoned or kept from the street? If the petitioner's parents had lived immediately upon or very near this excavation, and knowing the danger of permitting their child to go at large had actually permitted it to go to the place of danger, or suffered this to be done though actual negligence, the case might present more difficult questions than now arise. The Master does not find that the child was knowingly or even negligently permitted to go to or remain in the vicinity of the excavation. His parents lived over two blocks distant, and the finding is that he "strayed away from home" and was injured while at play with other children. It is not shown that the child was in the habit of going there; and as the receivers' negligence is positive and actual, and was the direct cause of the injury, and as the onus to establish the defense of contributory negligence is on the receivers (Railroad Co. v. Gladmon, 15 Wall. 401), and they have failed to show such negligence, they are liable. It is not necessary, in this view, to go into the learning upon the subject of imimputable negligence of parents to children, for in this case it is not shown that the parents were at fault in the child being at the place of the accident, at the time when the accident happened. Some of the cases seem to make the liability depend upon the means of the parents, and to countenance a distinction as to contributory negligence between parents able to employ nurses or attendants and those who are not. This distinction may be doubted; for there is not, in this country, one rule of law for the rich, and a different rule for the poor. It extends its protecting shield over all alike. The common law is justly distinguished for its solicitude for the public safety, and any person or corporation that illegally imperils the lives, limbs or health of the people is liable. The Tunnel Company has no more right, by having a dangerous excavation in the public ways, unnecessarily to impose upon the rich the duty to employ an attendant for their children than to impose upon the poor the impracticable duty of never allowing their children to escape from sight, lest they may be injured by its wrongful and illegal act.

The exceptions are overruled and an order will be entered in conformity with the report of the Master.

ORDERED ACCORDINGLY.

In McKinley v. Chicago & N. W. R. Co., 44 Iowa, 34, the plaintiff was forcibly and successfully resisted by a brakeman in attempting to enter a passenger car of the defendant. There is no statement of the evidence as to the loss of time incurred or actual injury received; but these appear to have cut no figure in the case. It was charged by the court below and held by the court above that it was not a case for exemplary damages. The discussion related to the propriety of an instruction that the jury might take into consideration and give damages for "the outrage and indignity" put upon the plaintiff. The instruction was held correct. Twelve thousand dollars damages were held to indicate passion and prejudice; but the court ordered the verdict to stand, if the plaintiff would accept a judgment for $7,000. Beck, J., however, thought $12,000 not too much, and Day, J., dissented, holding that outrage, indignity and mental suffering are not elements of co : pensatory damages.

(7.) Sedgwick on Damages, 6th Ed. 699, note 2; Indianapolis &c. R. Co. v. Stables, 62 Ill. 313; City of Chicago v. Langless, 66 Ill. 361. In City of Chicago v. Jones, 66 Ill. 349, an award of $1,000 to a servant girl for breaking her right arm was not deemed excessive. In Collins v. Council Bluffs, 32 Iowa, 324, $15,000 were awarded a married woman for the breaking of the bone of her left thigh, in consequence of ice accumulated on the sidewalk. It appeared that it made her a cripple for life. The court refused to disturb the verdict.

NOTES OF RECENT DECISIONS.

NEGLIGENCE—CONTRIBUTORY NEGLIGENCE — RESPONSIBILITY FOR OVERFLOW OF WATER—MEASURE OF DAMAGES.—*Gould v. McKenna*. Supreme Court of Pennsylvania, 6 W. N. 56. Opinion by AGNEW, C. J. 1. A householder who so constructs his roof that a large quantity of rain-water is collected against his neighbor's wall, through which it penetrates and causes damage, can not relieve himself from responsibility for such damage by showing that if the wall had been well built the water would not have gone through.

2. The contributory negligence which prevents recovery for an injury is that which co-operates in causing the injury—some act or omission concurring with the act or omission of the other parties to produce the injury (not the loss merely) and without which the injury would not have happened. A negligence which has no operation in causing the injury, but which merely adds to the damage resulting, is no bar to the action, though it will detract from the damages so far as the loss is solely attributable to such concurring cause.

CRIMINAL LAW — DEGREE OF EVIDENCE NECESSARY TO SUPPORT ALIBI —DECLARATIONS OF CO-CONSPIRATOR.—*Donnelly v. Com.* Supreme Court of Pennsylvania, 6 W. N. 104. Opinion PER CURIAM. 1. When the fact proved by the Commonwealth is not defined distinctly in point of time, but may have taken place within or between certain periods, the *alibi* must cover the *entire period* in its proof, otherwise the evidence given in proof of the *alibi* may be true, and the fact proved by the Commonwealth may also be true. There is no contradiction unless the evidence supporting the *alibi* covers the whole period. 2. In a criminal conspiracy, the members of which are also members of the same criminal organization, the declarations of a fellow-member and co-conspirator are evidence against all the parties to the conspiracy.

NEGLIGENCE—MUNICIPAL CORPORATIONS—UNAUTHORIZED ACTS OF CITY OFFICERS—CONTRIBUTORY NEGLIGENCE. — *Saylor v. City of Harrisburg.* Supreme Court of Pennsylvania, 6 W. N. 107. Opinion PER CURIAM. A city ordinance directed the construction of new water-works, and provided for the appointment of a committee whose duties were to advertise for proposals and make contracts, subject to the approval of the council, and to employ an engineer for the purpose of preparing necessary plans and specifications. The engineer, under the authority of this committee, and without the approval of the council, made a parol contract with a company to make a certain connection in the pipes by means of a casting. The work being negligently done, S was injured by an explosion and died: *Held*, that the city was responsible. 2. The question of contributory negligence is a mixed question of law and fact. When the facts are undisputed, the court should declare the law thereon.

CRIMINAL LAW—"POISONOUS AND NOXIOUS SUBSTANCES"—DEFINITION.—*People v. Van Deleer.* Supreme Court of California, 2 Pac. Coast L. J. 25. The defendant was charged with having administered "a poisonous and noxious substance" to the prosecuting witness, W. The section under which the indictment was framed is as follows: "Section 216. Every person who, with intent to kill, administers or causes or procures to be administered, to another, any poison or other noxious or destructive substance or liquid, but by which death is not caused, is punishable by imprisonment in the state prison not less than ten years." The court instructed the jury that if the defendant gave or administered to W "either a poisonous or noxious substance, with the intent then and there to kill him, as alleged in the indictment," they must find the defendant guilty. The court defined poisonous and noxious substances as follows: "A poisonous substance is one which has an inherent and deleterious property capable of destroying life. A noxious substance is not necessarily poisonous, but may be a substance which it hurtful and injurious." Per CURIAM "Accurate definitions of these terms can not be readily given, and, perhaps, are impossible, and proximate accuracy is all that may be required in the application of the statute in a given case; but the above definition omits some of the essential elements of the meaning of those terms, as employed in the statute. A *poison* is defined by Wharton & Stille (Med. Jur., § 493) as 'a substance having an inherent deleterious property, which renders it, when taken into the system, capable of destroying life.' A definition stated in 2 Beck's Med. Juris., with approval, is as follows: 'A poison is any substance which, when applied to the body externally, or in any way introduced into the system, without acting mechanically, but by its own inherent qualities, is capable of destroying life.' The definition of a poison given by the court would include substances which act upon the system mechanically so as to destroy life. In that respect the definition was too broad; but such substances are, in our opinion, included within the meaning of the words of the statute, 'other noxious or destructive substance or liquid.' The noxious or destructive substance or liquid mentioned in the statute is not merely such as might, when administered, be hurtful and injurious, but, like a poison, it must be capable of destroying life. Pulverized glass or boiling water, when administered in sufficient quantities, would destroy life, but they are not poisonous. The purpose of the statute is to provide a punishment for attempts to *kill*, by the means therein mentioned; and in order to bring a case within the statute it must be proved that the substance or liquid which was administered was capable of destroying life. The intent to kill could not be inferred from the act of administering a substance which has not the capacity of destroying life. The omission of that quality or capacity from the definition of a noxious substance, as given at the request of the prosecution, rendered it erroneous."

EQUITABLE MORTGAGE—REFORMING MORTGAGE—CONSTRUCTIVE NOTICE FROM RECORDS.—*Gale v. Morris.*—New Jersey Court of Chancery, 29 N. J. (Eq.) 222. —1. An equitable mortgage may arise from non-payment of the purchase-money, from a deposit of title deeds, or from an unsuccessful attempt to make a valid mortgage deed. 2. One who acquires legal title, with notice that the equitable title is in some other person than his grantor, will be decreed to hold the legal title for the benefit of the equitable owner. 3. A deed or mortgage may be reformed against a subsequent purchaser or mortgagee who acquires his rights with notice of the equities of the person seeking reformation. 4. Constructive notice, flowing exclusively from matters of record, can never be construed to be more extensive than the facts stated on the record. The suit was to reform a mortgage and for foreclosure. The mortgagor admits he agreed to mortgage the fee, and that the conveyance of a less estate was a mistake. The contention is between the mortgagee and the second incumbrancer who insists that no decree should be made affecting her rights. She was informed, when her mortgage was delivered, of the prior mortgage, and that her mortgage, which was given to secure a pre-existing debt, would be subsequent to that. The complainants, in their representative capacity, had loaned funds of the estate to the mortgagor, and in preparing the mortgage to them the word "heirs" was stricken from the printed form, and the word "successors" substituted. VAN FLEET, V. C. It is clear the complainants have no legal mortgage upon the fee. Their right to relief against the resisting defendant depends entirely, in my judgment, upon their ability to establish two propositions: First, that by their contract with the mortgagor they became mortgagees in equity of the fee; and second, that the defendant took her mortgage with notice of their equities. An equitable mortgage will arise from the non-payment of purchase-money, (1 Hill. on Mortg. 660); and it may also be created by a deposit of title-deeds (Griffin v. Griffin, 3 C. E. Green, 104; Brewer v. Marshall, 4 C. E. Green, 537); but a mere parol promise to make a mortgage for money lent will not create a lien. 4 Kent's Com. 154. It has also been held that an equitable mortgage may be created by an unsuccessful attempt to make a valid mortgage

deed, or to appropriate specific property to the discharge of a particular debt. 2 Story's Eq. Jur. § 1020, note, referring to Peckham v. Haddock, 36 Ill. 38, and McClurg v. Phillips, 49 Miss. 315; Lead. Cas. in Eq. (4th Am. ed.) 954. The soundness of this view seems to have been recognized by the Court of Errors and Appeals in Wheeler v. Kirtland, 6 C. E. Green, 552. The infirmity sought to be cured in that case was identical with that existing in this mortgage, but there being no proof showing that it had been agreed the mortgage should embrace the fee, the court declined to discuss how far an equitable lien might be established against creditors, but it was distinctly declared that an equitable mortgagee who pays full consideration when his mortgage is given, is entitled in equity to be regarded as a *bona fide* purchaser. Phelps v. Morrison, 10 C. E. Green, 538. In my view, according to both authority and principle, the complainants are mortgagees in equity of the fee of the mortgaged premises. This brings us to the question, did the defendant accept her mortgage with notice of the complainants' equities? There can be no doubt about the effect of such notice. Justice will not permit a person acting with full knowledge of the true situation, to hold against another a hard advantage he has obtained on a point of strict law. A deed may be reformed against a subsequent purchaser or mortgagee who acquires his rights with notice of the infirmity sought to be cured. Rutgers v. Kingsland, 3 Halst. Ch. 178; S. C. on appeal, Ib. 658. Where the equitable and legal titles to land are held by different persons, a purchaser of the legal title, who purchases with knowledge of the rights of the equitable owner, will be decreed to hold the legal title for the equitable owner, and may be required to convey to him. If he pays anything for it, with notice that the equitable owner has already paid the purchase-money, agreed upon, he will be compelled to convey without reimbursement. Weller v, Rolason, 2 C. E. Green, 13. Having expended his money for a thing he knew had been purchased and paid for by another, he can make no just claim to indemnity. Waldron v. Letson, 2 McCart. 126. Mere constructive notice of the existence of a mortgage, with no notice of the estate conveyed by it, will not be notice that the mortgage embraces a fee, when, by its terms, it conveys a life estate. Constructive notice, flowing exclusively from matters of record, can never be construed to be more extensive or broader than the facts stated on the record. Wilson v. King, 12 C. E. Green, 374. But in this case the proof shows actual notice as extensive and full as language could convey it. The defendant took her mortgage with full notice of the complainant's equities, and they are, therefore, entitled to a decree of reformation against all the defendants.

ABSTRACT OF DECISIONS OF SUPREME COURT COMMISSION OF OHIO.

December Term, 1877.

[Filed October 2, 1878.]

Hon. W. W. Johnson, Chief Judge.
" Josiah Scott, }
" D. T. Wright, }
" Luther Day, } Judges.
" T. Q. Ashburn, }

Specific Performance — Description. — To authorize a decree for specific performance on the ground that the party seeking it had contributed to the purchase-money, such contribution must be a definitely ascertainable portion thereof, and the contract, specific performance of which is sought, must so far describe the premises claimed as that the court may be able to ascertain what they are. Opinion by Wright, J.—*Maud v. Maud.*

Vendor and Purchaser — License to Enter Land not an Incumbrance.—1, A written license, without seal and unacknowledged, to enter upon and imbed water pipes in the land of another, with privilege to enter and repair them, creates no interest in, nor incumbrance upon the land such as will disable the owner thereof from making a good and sufficient deed conveying the title thereto. 2. A vendee of real estate protected as an innocent purchaser without notice, may not, at his option, elect to waive such protection, and rescind the contract of purchase for an alleged incumbrance not affecting the validity of the title. Judgment affirmed. Opinion by Scott, J. Day, J. and Wright, J., dissenting.—*Wilkins v. Irvine.*

Master and Servant—Common Employment.—Where a railroad company engaged in ballasting its road employed a hand to assist in loading and unloading a gravel train, and in the execution of this service it was necessary for him to ride on the train from the gravel pit to the place of unloading, the train being run under the direction of a conductor, and said hand having nothing to do with its management: *Held*, that such hand, while riding on the train, was a mere employee, and did not assume the character of a passenger; that he and the engineer of the train were engaged in a common service, and that as he was not under the control or subject to the orders of the engineer, the railroad company can not be held liable for negligence of the engineer resulting in his death—if it was not guilty of negligence in selecting the engineer. Judgment affirmed. Opinion by Scott, J.—*Kumler v. Junction Railroad Co.*

Presumption from Absence — Married Woman—Equitable Estoppel.—1. If a husband leaves his family and usual place of residence, and goes to parts unknown, or a distant state, and is not heard from for a period of seven years, a presumption arises that he is dead. 2. Where such presumption exists, and where the husband has abandoned his wife and minor children, without other means of support than the house and lot on which he resided before such abandonment, she may enter and contract as a *feme sole*. 3. If in fact the husband is not dead, yet, in such case, she is capable of binding herself, by way of equitable estoppel, by her acts and contracts as fully as if she were a *feme sole*. 4. And if she join with the children, who have come of age, in order to induce a sale of said real estate for their mutual benefit, in representing that he is dead, and thereby, and for value received, effects a sale of such real estate, and also joins them, as widow, in a conveyance in fee with covenants of general warranty, and the contract is fully executed by the purchaser: *Held*, that although the husband be living, and although such conveyance does not operate as a release of her inchoate right of dower, yet she is barred by way of equitable estoppel from treating her contract as a nullity, and from asserting her right to have dower assigned upon the actual death of her husband. 5. It is not necessary to constitute such equitable estoppel that a party should design to mislead: it is enough if the act or declaration was calculated to and did in fact mislead another who acted in good faith and with reasonable diligence. Judgment of district court reversed and that of the common pleas affirmed and cause remanded. Opinion by Johnson, C. J.—*Rosenthal v. Mayhew.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF OHIO.

December Term, 1877.

[Filed October 1, 1878.]

Hon. WILLIAM WHITE, Chief Justice.
" W. J. GILMORE,
" GEO. W. MCILVAINE,
" W. W. BOYNTON,
" JOHN W. OKEY,
} Associate Justices.

IN A PROSECUTION OF A WIFE for an assault upon her husband, he is a competent witness for the state. Judgment affirmed. Opinion by BOYNTON, J.—*Whipp v. State.*

FIRES CAUSED BY LOCOMOTIVES—NEGLIGENCE.—Where a railroad company is authorized to propel its trains and operate its road by the use of steam locomotives, no inference of negligence arises from the mere fact that an injury to adjacent property was caused by sparks emitted from such locomotives. Opinion by MCILVAINE, J.—*Ruffner v. Cin., H. & D. R. R. Co.*

CRIMINAL LAW — EXAMINATION OF DEFENDANT — PRIVILEGED COMMUNICATIONS.—Where the accused in a criminal trial becomes a witness in his own behalf, he can not be compelled, on cross-examination, to disclose the confidential communications between himself and his attorney; nor can such disclosures be required of the attorney without the consent of the accused. It is the privilege of the accused to have such communications protected from compulsory disclosure, and the privilege is not waived by his becoming a witness. Judgment reversed, and new trial ordered. Opinion by WHITE, C J.—*Duttenhofer v. State.*

BURGLARY — INDICTMENT — CORPORATION. — 1. Where the charge is burglary by breaking into the car of a railroad company, designated by its corporate name, but the indictment contains no averment that the company was incorporated, the accused can not avail himself of the defect, if defect it be, in view of the code of criminal proceedure, 66 O. L. 301, sec. 90; 74 O. L. 334. 2. If it be alleged that a burglary was committed in the car of a railroad company, the corporate character of the company is sufficiently shown by proof that it was, at the time of the burglary, a corporation *de facto*. Judgment affirmed, Opinion by OKEY, J.—*Burke v. State.*

CRIMINAL LAW—CONVICT AS WITNESS—EVIDENCE. —1. In an indictment for burglary by breaking into the office of a railroad company, there was no allegation that the company was incorporated: *Held*, that this is not a sufficient ground for sustaining a motion to quash. Burke v. State, *ante*, followed. 2. Where a convict who has been in the penitentiary two years, it taken therefrom to testify as a witness, and does so testify, it is competent for the adverse party to prove that his reputation for truth aud veracity was bad, at the time of and previous to his conviction, at the place where he then resided. 3. In order to justify the reversal of a judgment on the ground that the court below refused to permit certain evidence to be given, it is incumbent on the party complaining to show affirmatively that he was entitled to offer such evidence for some purpose stated in or manifest from the record. 4. On the trial of a criminal case, it is error to permit the state to prove, by cross-examination of a witness called by defendant, that the accused stands indicted for other offenses. Judgment reversed and cause remanded for a new trial. Opinion by OKEY, J.—*Hamilton v. State.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF IOWA.

September Term (*Council Bluffs*), 1878.

Hon. JAMES H. ROTHROCK, Chief Justice.
" WM. H. SEEVERS,
" JAMES G. DAY,
" JOSEPH M. BECK,
" AUSTIN ADAMS,
} Associate Justices.

CITY ORDINANCE--POWER TO REPEAL — STREET RAILWAY.—Where the ordinance under which a street railway company has built and is operating a single track line of railway provided that it might lay double tracks if desired, the city council has no power to repeal or change such provision without the consent of the company; the ordinance constitutes a contract whereby the company is secured in the exercise of the powers conferred therein. Opinion by BECK, J.—*City of Burlington v. Burlington Street Railway Co.*

MECHANIC'S LIEN — ESTABLISHED AFTER PAYMENT TO CONTRACTOR — LIABILITY OF CONTRACTOR'S SURETIES.—The sureties on the bond of a building contractor can not be held liable for the amount of mechanics' liens established against the building after full payment to the contractor has been made, even though the latter represented that all claims had been paid; it was the duty of the owner of the building, for the protection of the sureties, as well as himself, to withhold payment until the time of filing liens had expired. Opinion by SEEVERS, J.—*Lucas County v. Roberts.*

NOTICE — DEFECTIVE RECORD OF MORTGAGE. — Where a mortgage executed by Wm. H. Furman was indexed and recorded as given by Wm. H. Freeman, and for this reason was not shown by an abstract of the title to the land conveyed: *Held*, that such record did not constitute constructive notice of the incumbrance to a purchaser in good faith from the mortgagor, and that in the absence of actual notice he would take the land free from the mortgage. Opinion by ADAMS, J. *Howe v. Thayer.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF MISSOURI.

April Term, 1878.

HON. T. A. SHERWOOD, Chief Justice.
" WM. B. NAPTON,
" WARWICK HOUGH,
" E. H. NORTON,
" JOHN W. HENRY,
} Judges.

PRACTICE IN SUPREME COURT — MOTION FOR A NEW TRIAL AND IN ARREST MUST BE INCORPORATED IN BILL OF EXCEPTIONS— OTHER POINTS OF PRACTICE RELATING TO APPEALS AND WRITS OF ERROR.—This was an action of ejectment in which defendant had judgment in court below, and plaintiff has brought the case here by writ of error. All the errors complained of arose at the trial, and the motion for a new trial is not incorporated in the bill of exceptions: *Held*, that a motion for a new trial is no part of the record proper, and unless it be incorporated in the bill of exceptions this court can not notice it. It will not do to refer to it as appearing elsewhere in the transcript. We can not, therefore, enter into any examination of the errors assigned, but must affirm the judgment. Opinion by HOUGH, J.— *Comstock v. Becket.* Same principle, *Feisley v. Simmons*, per HENRY, J.

Comstock v. Parish, per HOUGH, J. And where there is nothing of record to show that the alleged bill of exceptions was ever filed, and there is no error in the record proper, the judgment must be affirmed. Opinion by SHERWOOD, C. J.—*Riggs v. Uptegrove; Devault v. Uptegrove.* And where the record does not show either an appeal or writ of error, the case will be stricken from the docket. Opinion by HOUGH, J.—*Owen v. Davis.* Same principle, *Scott v. Harbold*, per NORTON, J. Where plaintiff in error fails to file statement and brief as required by law, the writ of error will be dismissed. Opinion by HOUGH, J.—*First Nat. Bank of Jefferson City v. Clark; Hardin v. Mackey.*

MECHANICS' LIEN—CAN NOT BE ENFORCED ON LANDS OF RAILWAY COMPANY, CONSTITUTING ITS RIGHT OF WAY, FOR IMPROVEMENTS THEREON.—Mechanic's lien, sought to be enforced by plaintiff against freight depot and grounds of defendant railway, for lumber furnished for construction of said depot, which was situated on the lands and lots of defendant, and between main track and side track of said railway, immediately adjoining up to said track, and on the 100 feet strip of land granted to said company as a right of way for a railroad. Plaintiff filed his lien and commenced his suit within the time required by law, and prior to passage of act of March 21st, 1873, entitled "An act to protect contractors, subcontractors and laborers in their claims against railroad companies and corporations," etc. Session Acts, pp. 60 and 61. The freight depot was destroyed by fire after suit was brought, but before trial of the cause. Verdict and judgment for plaintiff. *Held*, 1. It is not necessary to determine in this case whether the act above referred to allowed sales of detached portions of a railroad, or to require the entire road to be sold in any and every lien enforced under its provisions, as this case, having been brought prior to its passage, must be determined by the general law in regard to mechanic's liens. 2. The 100 feet strip upon which the building is situated having been granted to defendant railway company *as a right of way for defendant's railroad*, can not be made subject to a mechanic's lien. In Dunn v. N. M. R. R., 24 Mo. 493, the court evidently regarded it as against the policy of the state to allow detached portions of a railway to be sold under execution on a judgment enforcing a mechanic's lien. See, also, supporting the same view, McPheters v. Bridge Co., 28 Mo. 467; Proprietors v. M. & L. R. R. Co., 104 Mass. 9. The second section of the railroad corporation act (1 Wag. Stat. 297), provides that "such corporation shall have power to hold such voluntary grants of real estate and other property as shall be necessary for the construction and maintenance of its railway, but such real estate shall be held and used '*for the purposes of such grant only.*'" It would seem that the general purpose of our statutes, as well as the construction of them by this court, would indicate that the mechanic's lien act was not designed to allow a railroad to be sold out in detached parcels. 3. In the present case, it is not necessary to determine the point whether the destruction of the building by fire, on which a lien is claimed, would destroy the lien, and it is therefore left for further adjudication. Reversed and remanded. Opinion by NAPTON, J.—*Schulenburg v. M. C. & N. W. R. R. Co.*

MORTGAGE TO COUNTY BY DELINQUENT COLLECTOR FOR INDEBTEDNESS TO COUNTY NOT INVALID—ACCEPTANCE BY COUNTY DOES NOT, PER SE, RELEASE SUCH OFFICER'S SURETIES ON HIS OFFICIAL BOND.—The question in this case is whether a bond and mortgage to a county, taken to secure the delinquency of a sheriff and *ex-officio* collector, whose sureties on his official bond were, at the time, perfectly good and solvent, is of any validity. The county court had directed suit upon the sheriff's bond, and during pendency of such suit, accepted the bond and mortgage in question, and dismissed suit against officer and his sureties. County sued on the mortgage, obtained judgment of foreclosure, bought the land sold under execution, and received deed, which was duly recorded. *Held*, 1. That county had no power to exact such a mortgage, certainly none to substitute it for the original bond, and thereby discharge the sureties. But the bond and mortgage were voluntarily given to secure an indebtedness to the county. Is there any statute which prohibits this? In the Revised Code of 1845 is found this section: "All deeds, grants and conveyances made, acknowledged and recorded as other deeds, conveying lands, tenements or hereditaments to any county, etc., for the use and benefit of such county, shall vest in such county in fee simple all the right, title, interest and estate which the grantor in such deed had at the time of the execution thereof, in the lands conveyed." This section has been retained in the revision of 1855 and 1865, and is now found rather strangely in the present code under the head of "Uses and Trusts," 2 Wag. Stat. § 13, p. 1382. It may be that the intention of the county court in dismissing the suit against the officer and his sureties and taking the bond and mortgage was to release the sureties; and it may be that the effect of this proceeding, through lapse of time, has so resulted: but this does not destroy the title of county to the land conveyed to it to secure an indebtedness to the county. See Barry County to use of State School Fund v. McGlothlin, 19 Mo. 307. The decisions of this court in regard to mortgages to secure the school funds, are not applicable to the facts in this case. Reversed and remanded. Opinion by NAPTON, J.—*Turner v. Clark Co.*

PAYMENT IN COUNTERFEIT MONEY DOES NOT DISCHARGE DEBT—OFFER TO RETURN SUCH MONEY WITHIN REASONABLE TIME—CREDITOR MAY MAINTAIN ACTION—REASONABLE TIME A QUESTION FOR JURY.—Plaintiff presented a draft at defendant bank which was cashed in currency, among which was a counterfeit United States treasury note for $50. Upon discovery of this fact, although at what time does not appear from the record, plaintiff offered to return to the bank the forged bill and demanded that the bank should redeem it and pay him good money in lieu thereof, which bank refused. Thereupon plaintiff brought suit, had judgment, and bank appeals. *Held*, 1. The reasonable doctrine, and one which undoubtedly agrees with the common sense of mankind is, that if a creditor receive by mistake anything in payment different from what was due, and upon the supposition that it was the thing actually due, the debtor is not discharged, and the creditor upon offering to return that which he received, may demand that which is due by the contract. Markee v. Hatfield, 2 Johns. (N. Y.) 458. Legal tender treasury notes are here on the same footing with gold guineas in England, but it is not expedient, in either case, to follow the loose *dicta* reported in some ancient English cases, and referred to by Judge Kent, even if there was no doubt of the genuinness and correctness of the report, instead of adopting the rules of the civil law and of the French code, conforming, as they do, to the common sense of mankind. 2. The general rule in regard to what is a reasonable time within which a party must perform a duty imposed on him by law, is that it is a question of law for the court, where the facts are undisputed; but there are exceptions to this rule, in which the whole matter is left to the jury. Howe v. Huntingdon, 15 Maine, 332; 16 Maine, 164; Cocker v. Franklin Man. Co., 3 Sumner, 580; Ellis v. Thompson, 3 M. & W. 445. A party who innocently pays away a counterfeit bill is not bound

to take it back, unless it is returned to him in a reasonable time after it is discovered to be spurious; and the reason of the rule is, to enable him to trace out and fall back upon the person from whom he received it. But what shall be considered a reasonable time must necessarily depend on the situation of the parties and the facts and circumstances of each case. Union N. Bk. v. Balderwick, 45 Ill. 375; Simmes v. Clark, 11 Ill. 237; Burrill v. Watertown, Bk., 51 Barb. 105. In the present case the jury were told that "by reasonable time is meant such time as would enable plaintiff, after discovering the forgery, to go to defendant without material interference with his usual and ordinary business." This was more favorable to the defendant than the rule in the cases above referred to, that plaintiff had the right to have the whole question referred to the jury. Affirmed. Opinion by NAPTON, J.—*Boyd v. Mexico Southern Bank.*

ABSTRACT OF DECISIONS OF SUPREME JUDICIAL COURT OF MASSACHUSETTS.

July Term, 1878.

HON HORACE GRAY, Chief Justice.
" JAMES D. COLT,
" SETH AMES,
" MARCUS MORTON,
" WILLIAM C. ENDICOTT, } Associate Justices.
" OTIS P. LORD,
" AUGUSTUS L. SOULE,

TRUST FOR CHARITABLE USES—CONVEYANCE BY TRUSTEE—ACTION TO RECOVER TRUST FUND—STATUTE OF LIMITATIONS.—1. A will containing the following clause, "and further, at the decease of my said wife, Oressa, all of the above property left in trust for her benefit shall be disposed of as follows, that is: Fifteen hundred dollars of the same shall be given to the West Parish in Boxford, to build and support a public school for the education of children (as the law now directs)," was held to create a bequest for charitable uses; and it was held further that the beneficiaries of the bequest were sufficiently definite to be the subject of such a bequest. 2. The trustee of such a trust can not convey the trust fund to a school district within the limits of the parish. If it were an absolute disposition of the fund it would be a violation of duty; if, however, it was understood by all parties as a mere substitution of the district for the parish, in order that the district might, as trustee, administer the trust, it was not competent for it to do so without the consent of the court of chancery. Harvard College v. Society, etc., 3 Gray, 280. It appearing that the defendant was the chairman of the committee appointed, first by the parish and then by the district, to receive the trust fund; that at present he is the only member of the committee, his associates disclaiming any authority to act or power over the fund; that, as chairman of the plaintiff's committee, he received the fund and the nominal transfer of the fund to the district, involving no change in the actual custody of the fund; that he has had, since its receipt from the testator's estate, the actual keeping and control of the fund, which he has kept specifically as the fund, and now holds; that he has never claimed a personal property in the fund, but has always claimed to hold it subject to the trust, it was *Held*, that the plaintiff (the original trustee) was entitled to recover the fund. 4. In such a case the statute of limitations would not be a bar to the claim against the defendant. He must show that in some open and notorious manner he has disclosed to the party in interest his purpose to hold the fund adversely to the trust, for a period of time long enough to bar the claim, and under circumstances in which he was subject to a suit for it. Opinion by LORD, J.—*Second Religious Society of Boxford v. Harriman.*

RENTS AND PROFITS OF REAL ESTATE — ACTION.—In the absence of a special devise or contract, the rents and profits of the real estate of a deceased person belong to his heirs or devisees, and not to his administrator or executor, even if the estate is insolvent, unless and until the real estate is sold for the payment of debts, under a power expressed in the will or by license of court; and if the executor or administrator receives such rents, the heirs or devisees may recover them from him in an action at law. Gibson v. Farley, 16 Mass. 280. Opinion by GRAY, C. J.—*Brooks v. Jackson.*

AGENCY — CREDIT — EVIDENCE,— In an action brought to recover the price of certain property sold by the plaintiff's agent, if the question is which one of the two parties actually purchased the property, the fact that the plaintiff delivered the goods upon the agent's statement is a competent fact; but upon whose credit he delivered the property is an immaterial fact (which he could have determined only by his own construction of the language which the agent communicated to him), and incompetent, His statement that he delivered the property upon the credit of the defendant is merely another mode of giving his construction to the language which might or might not have been sufficient to create a contract between the parties, which under no circumstances could be competent evidence. Opinion by LORD, J.—*Walker v. Moors.*

SEVERAL ACTIONS FOR ONE CONVERSION.—In an action of tort for the conversion of certain articles that were part of a large number, converted at one time by one act, for which conversion a judgment had been recovered by the plaintiff against the defendant which had been paid, the plaintiff can not be allowed to prosecute his suit by proof that the defendant fraudulently concealed the fact that the articles, for the value of which this suit was brought, had been taken by him, and that he had fraudulently prevented the plaintiff from ascertaining the fact by refusing to allow him to examine the articles taken. See Folsom v. Clemence, 119 Mass. 473. Opinion by LORD, J.—*McCaffrey v. Carter.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF ILLINOIS.

[Filed at Ottawa, June 21, 1878.]

Hon. JOHN SCHOLFIELD, Chief Justice.
" SIDNEY BREESE,
" T. LYLE DICKEY,
" BENJAMIN R. SHELDON,
" PICKNEY H. WALKER. } Associate Justices.
" JOHN M. SCOTT,
" ALFRED M. CRAIG,

MANDAMUS—PREVIOUS DEMAND AND REFUSAL.—This was an appeal from a judgment of the court below, awarding a peremptory *mandamus* for the payment of a judgment held by appellee, by assignment from one Peter Mar against appellant. Several preliminary objections are taken to the jurisdiction of the court below, SCHOLFIELD, C. J., who delivered the opinion, says: "The duty here sought to be enforced rests upon appellant as a corporate body, and there is therefore no impropriety in directing the writ to it. Dillon on Municipal Corporations, 70; 78 Ill. 382. No objection appears to have been urged in the court be-

low on account of a previous demand, and it is therefore too late to urge the objection now, even if we were to concede its materiality. 'The objection,' says Tapping, in his work on *Mandamus*, 'as to the neglect of a demand or the absence of a refusal should, in order to prevent a waste of time, be objected to in the first instance, viz., in showing cause against the rule for the writ, and cannot be made after the merits of the case have been discussed.'" Affirmed.—*City of Chicago v. Sansum.*

SUMMONS—MISNOMER—EFFECT OF APPEAL BY PARTY NOT SUMMONED.—Suit was commenced before a justice of the peace, by the plaintiff, against Michael Andrew Roorke. The summons was returned as "served on the within named defendant, Andrew Roorke. Judgment was rendered in favor of the plaintiff, and against Andrew Roorke. Within twenty days from the date of this judgment Andrew M. Roorke, a son of Michael Andrew Roorke, filed an appeal bond in his own name, and the cause was docketed in the circuit court as "——— v. Andrew M. Roorke, sued by the name of Andrew Roorke." The cause came on for trial in the circuit court, and evidence was given on both sides, when it seems to have been discovered, for the first time, that the party appealing and defending, was not the one sued, and against whom the judgment was rendered, whereupon the appeal was dismissed. Andrew M. Roorke appeals from that judgment and argues that, inasmuch as issue was joined, and evidence proved, he was entitled to have judgment. SCHOLFIELD, C. J., who delivered the opinion, says: "It is very clear Andrew M. Roorke could not prosecute an appeal from the judgment rendered by the justice of the peace. He was no party to it, and it nowise concerned him. No one has a right to appeal from a judgment who is not in fact a party to it." Affirmed.—*Roorke v. Goldstein.*

PLEADING — DUPLICITY — LIABILITY OF STOCKHOLDERS.—This was a suit by plaintiff to recover of defendant as a stockholder in a corporation under the ninth and tenth sections of the act of 1857. Defendant pleaded various pleas, to which plaintiff demurred, and the court sustained the demurrer and gave judgment for plaintiff. Defendant appeals, and claims that the court erred in sustaining the demurrer to his third plea which avers that, at the time the indebtedness accrued, defendant had fully paid all the capital stock he subscribed for, and that he had paid to the creditors of said corporation an amount of money equal to the amount of stock held by him. And the grounds of demurrer specified as reasons therefore, "that the plea is double, and alleges two grounds of defense, and that it does not state the names of the creditors to whom the money was paid. The court *held* that, according to the authority of Chitty on Pleading, the demurrer should have pointed out specifically in what the duplicity consists. WALKER, J., who delivered the opinion, further says: "Nor does the plea set up two grounds of defense. It avers first, that at the time the indebtedness sued on accrued, he had paid for all the stock, for which he had subscribed. But to have rendered this a defense it should have appeared that all other shareholders had done so, and a certificate of the fact had been made and filed in the clerk's office as provided in the 10th section of the act. This, then, was but a part of the facts constituting a defense. When he had paid the corporation in full for his stock and had also paid a like sum to the creditors of the company before this indebtedness accrued, that, under any construction that can be given to the act, discharged him from liability." Reversed and remanded.—*Kipp v. Martin.*

TAXATION—EXEMPTION OF PROPERTY—WESTERN SEAMAN'S SOCIETY—FOREIGN CORPORATIONS.—The only question which arises in this case, is whether the real estate in the city of Chicago, owned by a corporation created in Ohio, entitled the "Western Seaman's Friend," and used chiefly as a home for sailors and their families, should be exempt from taxation under the laws of the State of Illinois. SCOTT, J., who delivered the opinion, says: "Property exempt from taxation under that clause of the revenue law cited, is property of 'institutions of purely public charity.' Such institutions must be corporations, or else they would not be capable of taking and holding property, whether real or personal. What institutions had the general assembly in view, in providing for exemption from taxation as to their property? Primarily, the legislature must have meant such institutions of public charity as have been, or may be established by the laws of this state, such as asylums for the care of the insane, etc. Under our constitution, which requires that all taxes shall be imposed equally upon the property of persons and corporations, exemptions from such burdens are to be construed strictly, and are not to be enlarged or made to embrace other subjects by judicial construction than those plainly expressed in the act. It may be well doubted whether that clause of the statute was intended by the legislature to embrace more than institutions of public charity, such as have been founded and are maintained solely by the state, as contradistinguished from institutions formed by private enterprise, for the dispensation of private charities. Belonging to the latter class is the institution now seeking exemption from taxation on its property." The court further say that if a broader construction could be given to the statute, so as to let in private charitie there is still a valid reason why the property of this institution should not be exempt, viz: The statute "must be understood to have exclusive reference to institutions created by the laws of this state, and not to foreign corporations that locate here." Reversed. DICKEY, J., dissents.—*People v. Western Seaman's Friend Society.*

BOOK NOTICE.

A TREATISE ON THE DOCTRINES OF RES ADJUDICATA AND STARE DECISIS. By J. C. WELLS, author of "Questions of Law and Fact;" "Instructions to Juries and Bills of Exceptions;" "Separate Property of Married Women," etc. Des Moines, Ia. Mills & Co. 1878.

This is a work on a couple of legal topics which are only incidentally treated of in other treatises. Over 500 pages are devoted to the subject of *Res Adjudicata*, and about 75 to the maxim *stare decisis et non quieta movere*. Over 1,000 cases are cited. The book appears to be well arranged, though it would have been much better had headings been made to the sections, after the style of most of the recent law books which we have noticed. The reader's attention is more likely to be attracted to what he is looking for when these catchwords are employed, than when the subjects of the sections are only to be found at the beginning of the chapters.

According to our custom this book would have received earlier notice, but for the fact that soon after we received it a prominent member of our bar, who was investigating the subject, took it for the purpose of assisting him in his search. After a much more careful examination of the work than we could have given it, he is of the opinion that it states the law on the subjects very clearly, and has collected together all the cases of importance. While thinking that it is somewhat pad-

ded by very lengthy extracts from the reports, he believes it will be useful to the profession. It might, he adds, have been more thorough—the author sometimes failing to get to the bottom of a question. A subsequent examination of the book induces us to believe that his judgment is both fair and correct.

QUERIES AND ANSWERS.

[Correspondents in this department are requested to make their questions and answers as brief as possible. Long statements of facts of particular cases will be rejected. Anonymous communications will not be noticed.]

QUERIES.

LIMITATION IN MISSOURI.—What was the statute of limitation in Missouri as regards foreclosing of a mortgage in the year 1862. Mortgage given in 1862? Can the statute of limitations be pleaded in bar? Was it ten years in 1862 the same as now? E.

Lancaster, O.

ANSWERS.

No. 56.

[7 Cent. L. J. 199.]

If the note be negotiable, the indorsement after due makes it equivalent to a new bill at sight. Although the maker be insolvent, demand must be made and notice given within a reasonable time. Davis v. Francisco, 11 Mo. 572; 2 Pars. Notes and Bills, 13. What will be reasonable time depends upon the circumstances of the case, the same rules applying as in the case of a sight bill. Winville v. Welch, 29 Mo. 203; 1 Pars. Notes and Bills, 375 *et seq.* and notes. The time when D made demand is not stated in the query; but as he did so in a "short time after he became owner," he probably can hold B. But as C kept the note "some time" after he received it, B would be released.

St. Louis. JOS. T. TATUM.

NOTES.

HON, JAMES H. ROTHROCK has been re-elected to the Supreme Court of Iowa, and Hon. William White to the Supreme Court of Ohio.—Lord Chelmsford, an eminent English lawyer, died last week. He was born in 1794, and was appointed attorney general in 1845. In 1858 he became Lord Chancellor of England, but resigned in 1859. He again held the same office from 1866 to 1868. His son, Mr. Justice Thesiger, is a judge of the English Court of Appeal.—The "oldest solicitor" in England died on the 9th instant. He was born March 12, 1777.—The British Social Science Association will hold its twenty-second congress, commencing October 23d. In the department of Jurisprudence the subjects discussed will be: 1. The codification of the criminal law, with special reference to the proposed government bill. 2. Simplification of the evidence of title to real property by record of title or otherwise. 3. Whether the extinction of all customary and other special tenures, and the limitation of leasehold terms are not desirable? 4. Should the summary jurisdiction of magistrates be further extended? 5. The consideration of the proceedings of the Stockholm International Prison Congress.—This is the way lawyers advertise in New Zealand; "Notice to the whole of the tribes in New Zealand, of Wairarapa, of Taranaki, of Ahuriri, of Taupo, and Poverty Bay. This is a notice to you all, that none of you shall sign your names for the sale of lands, of leases, of mortgages, or of anything concerning land. First come all of you to me, that you may understand what you are about to do. From Rees, Lawyer, Napier."

THE British Social Science Association some time since, for the purpose of ascertaining the practical workings of the laws adopted in some of our states, permitting the testimony of accused persons in criminal cases, sent out a series of queries to the different Chief Justices of those states. A number of replies have been received. The principal queries were: 1. If your system has been changed in favor of admitting the testimony of prisoners, how has the new system worked in practice, and has it given satisfaction to the profession and the public? 2. Especially has the change been productive of any real hardship or injustice to the innocent, or has it assisted in bringing the guilty to punishment? As to the effect of the law in Maryland, Chief Justice Bartol replied: "1. So far the new system appears to work tolerably well; but what may be the ultimate opinion with regard to its merits remains to be seen. Its efficacy as a means of disclosing the truth depends greatly upon the vigor and skill of the prosecuting attorney. If he be weak and unskillful, and the accused be an ordinary representative of his class—a shrewd and cunning fellow—it will always be in his power, unless the adverse evidence be direct and overwhelming, to create such doubt as to furnish ground for an ingenious counsel to claim an acquittal. Many clear cases of guilt, depending on circumstantial evidence, will doubtless be turned in favor of the prisoner, upon his own evidence, however false it may be. 2. The change has certainly not been productive of any real hardship or injustice to the accused; but whether the working of the system will materially aid in bringing the guilty to punishment may admit of great doubt. Our experience of the working of the law in practice is not sufficient to enable us to form any very definite opinion upon the subject." From Michigan, Chief Justice Cooley, says: "1. The new system has worked well, and gives general satisfaction. The best evidence of this, perhaps, is that no one proposes to go back to the old system. Indeed, that seems to us barbarous. I am confident innocent men are often saved from conviction by their explanations, while guilty persons are very likely to injure their case if they place themselves on the stand. 2. This, I think, is answered above. The sentiment here is against *compelling* accused parties to disclose, and their not doing so is not allowed to be the subject of comment to the jury. Therefore our system cannot work any hardship to the innocent. I believe it does assist in bringing the guilty to punishment in this way, in their unintentionally supplementing by their statements the evidence put in by the prosecution." From Nevada, Chief Justice Hawley replies: "1. The members of the profession entertain different opinions upon the question; but the practice has given satisfaction to the public. 2. The rule of allowing prisoners to testify has not been productive of any hardship or injustice to the innocent. Whether it has assisted in bringing the guilty to punishment is a more doubtful question, and one upon which there is much difference of opinion. And from New Hampshire, Chief Justice Doe: "1. The new system has worked well in practice, and has given satisfaction to the profession and the public. 2. The change has not been productive of any real hardship or injustice to the innocent. On the contrary, it has greatly facilitated their acquital. Sometimes it enables the guilty to escape; sometimes it secures the conviction of those who would escape if they were silent. On the whole, it is an undoubted improvement."